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MEMORANDUM

November 21, 2002

TO: Public Disclosure Commission

FROM: Nancy Krier, Assistant Attorney General 
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SUBJECT: **BACKGROUND ON MODIFICATION/SUSPENSION PROTOCOLS
FOR F-1 REPORTS – Agenda Item for December 2002 Meeting**

It is anticipated that the December 4, 2002 Public Disclosure Commission meeting agenda will include an item regarding the reporting modification protocols for F-1 reports. This memorandum provides some background. The three items it is anticipated you will be discussing include:

- ☐ Changing the format from protocols to interpretations;
- ☐ Clarifying language regarding lawyer and law firm disclosures for business, corporate, and government clients; and
- ☐ Clarifying language regarding reporting information on spouses.

General Background

Candidates and certain public officials are required to report their financial affairs on a "Personal Financial Affairs Statement" (an "F-1" form). RCW 42.17.240, RCW 42.17.241. The statutes require, among other things, the reporting of governmental, corporate or other business clients from whom the reporter receives \$7,500 or more during a reporting period. The Commission is authorized to allow modifications or suspensions of these reporting requirements under RCW 42.17.370(10) when it finds that "literal application" of the chapter "works a manifestly unreasonable hardship" and that the suspension or modification of the reporting requirements "will not frustrate the purposes of the chapter." The Commission shall suspend or modify the reporting requirement or requirements only to the extent necessary to substantially relieve such hardship, and only upon clear and convincing proof of such claim. Id.

The Commission adopted rules to further identify reporting modification/suspension procedures. WAC 390-28. The procedures include making the request in writing, and requesting a hearing before the Commission. The possible qualifications for obtaining a reporting modification with respect to an F-1 form are identified in WAC 390-28-100. See enclosed.



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While each modification or suspension request is reviewed upon its individual merits and the circumstances presented, due to the volume and similarity of modification or suspension requests concerning F-1 forms from certain professions, in the past several years the Commission developed a series of "protocols" with respect to those professions. The protocols are guidelines that facilitate consideration of such requests. Those professions include lawyers, law firms, judges, and motor vehicle dealers. One protocol is named after a former Commissioner, Commissioner Alma Kimura, who worked on developing the guidelines for lawyer and law firm disclosures the in the early 1990's.

Interpretation Format

The interpretation format, which does cross-reference the Commission's statutes and WAC's, would allow for easier reference by the Commission and members of the public. See RCW 34.05.010(8) (definition of "interpretive statement"), and other Commission interpretations posted on the PDC's website. The interpretation would reflect the Commission's interpretation of the reporting modification/suspension statute and its rules, as applied to these professions. The interpretation could be posted on your website, as well as sent to members of the professions addressed in the protocol (interpretation) who are seeking modifications or suspensions.

Clarifications

In addition to a format change, it is anticipated staff will be proposing clarifications to the reporting requirements for lawyers and their law firms, and for spouses. The clarifications would reflect modifications or suspensions previously addressed by the Commission, and in case law.

Law Firm Disclosures - History

In 1973, Attorney General Slade Gorton issued a formal Attorney General Opinion explaining that attorneys must include in their financial reports certain information regarding certain clients. AGO 1973 No. 1.

In 1974, the financial affairs disclosure requirements were upheld by the State Supreme Court in Fritz v. Gorton, 83 Wn.2d 275, 517 P.2d 911 (1974). That same year, the Commission adopted rules regarding modification/suspension requests.

In the following years, there were various enforcement cases and other proceedings concerning what attorneys should report for their business, corporate and governmental clients, given certain other obligations regarding client confidences and secrets as provided in prior "Canons" (now called "Rules of Professional Conduct"). The current RPC is 1.6 (see attached).

Beginning in 1989, the Commission did an extensive amount of work and provided information to the Washington State Bar Association on how the Commission's F-1 reporting requirements would be implemented for lawyers and law firms, in light of the canons/RPC's. In May 1990, Commissioner Kimura also explained to the WSBA that where a client's identity is not already a matter of public record or public knowledge, it is the attorney's burden to request the consent of other business, corporate or governmental clients to enable the attorney to comply with the reporting requirements under RCW 42.17. She further stated that where

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the client objects to disclosure or where obtaining the client's consent would cause an unreasonable hardship, it is up to the attorney/official to seek a further request for a reporting modification.

In March 1990, the WSBA Board of Governors adopted a policy statement stating that a lawyer seeking or holding public office may: (1) disclose the identity of those business, corporate and government clients whose attorney/client relationship is a matter of public record or public knowledge, and (2), seek consent of other business, corporate and government clients whose identity is required to be disclosed under the Public Disclosure Act.

In 1991, the work by Commissioner Kimura and the Commission ultimately resulted in "The Kimura Protocol."

In 1997, the WSBA issued Formal Opinion 194 that addressed RPC 1.6, and disclosures by lawyers of client identities to the Internal Revenue Service. The opinion concluded that in the absence of a court order, *if* a client has forbidden his/her lawyer to disclose the client's identity because the client maintains the identity is a secret, the lawyer cannot disclose that information, with certain exceptions not relevant here. This conclusion is similar to that of the courts in several recent cases. The courts have held the identity of a client does not fall within the purview of the information protected by the attorney-client privilege unless there is a "strong probability" that the disclosure would convey the substance of a confidential communication between client and attorney. Splash Design, Inc. v. Lee, 104 Wn.App. 38, 14 P.3d 879 (2001) (describing Rule of Professional Conduct 1.6 and citing to Dietz v. Doe, 131 Wn.2d 835, 935 P.2d 611 (1997)); Tegland, Washington Practice, Vol. 5A, § 501.15 (1999); United States v. Hunton & Williams, 952 F.Supp. 843 (D.C. 1997)(under federal law, absent special circumstances, identity of a client of a lawyer or law firm is not protected by attorney-client privilege); C.K. Liew v. Breen, 640 F.2d 1046 (9th Cir. 1981) (citing to California law for same proposition, and to J. Wigmore, Evidence § 2313).

Finally, with respect to public agency clients of law firms, records documenting payment of public funds to firms would generally fall within the definition of "public record." RCW 42.17.020(36).

Spouses

Under RCW 42.17.241(1), "The statement of financial affairs required by RCW 42.17.240 shall disclose for the reporting individual and each member of his or her immediate family..." An "applicant" for a modification request is defined at WAC 390-28-020 as "any person as defined in RCW 42.17.020 (21) [statutorily renumbered (30)] that seeks a modification pursuant to RCW 42.17.370(10) and these rules." On occasion, the applicant seeks not a modification or suspension of his or her information to be reported, but that of what he or she must report regarding a spouse. Therefore, the Kimura Protocol has also addressed reporting requirements for information concerning spouses of those required to file an F-1.

Enclosures

Cc: Vicki Rippie
Phil Stutzman

WAC 390-28-100 Reporting modifications -- Possible qualifications. The following, or any of them, may be considered possible qualifications for a reporting modification:

(a) Reporting any financial interest, otherwise required to be reported by RCW 42.17.241 (1)(b) of said act, if the financial institution or other entity in which the candidate or official having such interest does not engage in business in the state of Washington, or is not regulated in whole or in part by the office sought or held by such candidate or elected official, and provided that such reporting would present actual difficulties to the candidate or official and the interest in question would present no actual or potential conflict with the proper performance of the duties of the office sought or held, in the public interest.

(b) Reporting any of the information required by RCW 42.17.241 (1)(f) and (g), if public disclosure would violate any legally recognizable confidential relationship: Provided, The information in question does not relate to a business entity which would be subject to the regulatory authority of the office sought or held by such candidate or elected official in whole or in part: And provided further, That such reporting would present actual difficulties to the candidate or official and the interest in question would present no actual or potential conflict with the performance of the duties of the office sought or held, in the public interest.

(c) Reporting any of the information required by RCW 42.17.241 for members of the immediate family of a candidate or elected official, if such information relates to a financial interest held by such member under a bona fide separate property agreement, or other bona fide separate status and such financial interest does not constitute a present or prospective source of income to such candidate or elected official or to any other person who is dependent upon such candidate or elected official for support in whole or in part.

(d) Reporting any other matter which would constitute an unreasonable hardship in a given case, when the matter reported would not indicate any actual or potential conflict with the proper performance of the duties of the office sought or held in the public interest.

[Statutory Authority: RCW 42.17.370(1). 85-22-029 (Order 85-04), § 390-28-100, filed 10/31/85; 80-02-106 (Order 80-02), § 390-28-100, filed 1/24/80; Order 64, § 390-28-100, filed 11/25/75; Order 62, § 390-28-100, filed 8/26/75; Order 24, § 390-28-100, filed 2/21/74.]

RULE 1.6 CONFIDENTIALITY

(a) A lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in sections (b) and (c).

(b) A lawyer may reveal such confidences or secrets to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a crime;
or

(2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, to respond to allegations in any proceeding concerning the lawyer's representation of the client, or pursuant to court order.

(c) A lawyer may reveal to the tribunal confidences or secrets which disclose any breach of fiduciary responsibility by a client who is a guardian, personal representative, receiver, or other court appointed fiduciary.

[Amended effective September 1, 1990.]

PDC Interpretation

DRAFT

APPROVAL
DATE:

NUMBER: 02-03

STATUS: Pending

SUPERSEDES: Prior Protocols

REFERENCES: RCW 42.17.240
RCW 42.17.241
RCW 42.17.370(10)
WAC 390-24
WAC 390-28
“F-1” Form (Personal Financial
Affairs Statement)
PDC Declaratory Order No. 7
PDC Interpretation 91-01
“Personal Financial Affairs
Statement – Instruction Manual
and Blank Forms”

APPROVED BY: The Commission

Requests for Modification of the Requirements to Report Information on the Personal Financial Affairs Statement (F-1) For Lawyers and Law Firms

Background

The Public Disclosure Commission enforces the election and campaign reporting requirements in chapter 42.17 RCW. The statutes require certain candidates and public officials to report their financial affairs on a “Personal Financial Affairs Statement” (an “F-1” form). RCW 42.17.240, RCW 42.17.241. The Commission is authorized to allow modifications or suspensions of these reporting requirements under RCW 42.17.370(10) when it finds that “literal application” of the chapter “works a manifestly unreasonable hardship” and that the suspension or modification of the reporting requirements “will not frustrate the purposes of the chapter.” The Commission shall suspend or modify the reporting requirement or requirements only to the extent necessary to substantially relieve such hardship, and only upon clear and convincing proof of such claim.

The PDC has adopted rules to further identify reporting modification/suspension procedures. Those rules are in WAC 390-28. The procedures include making the request in writing, and requesting a hearing. The requester is not required to attend the hearing in person and may instead submit a written, sworn statement. The possible qualifications for obtaining a reporting modification with respect to an F-1 Form are identified in WAC 390-28-100.

In addition, due to the volume and similarity of modification or suspension requests concerning F-1 Forms from certain professions, the Commission has also developed a series of “protocols” that interpret the statute and rules with respect to those professions. The protocols enable easier consideration of such requests. Those protocols are now being provided in this single interpretation.

PDC Interpretation

Lawyers and Law Firms Protocol (When Applicant is an Incumbent and Acts Alone or as Part of a Governing Body, Board or Commission)

The “~~Kimura Protocol~~” following language is to be used when the applicant must report the activities of a law firm because of the relationship to the firm by ~~either~~ the applicant ~~or the applicant’s spouse~~.

The following ~~format~~ language is to be used when the applicant is an **incumbent** (holds office or the position) and **acts** either acts alone, ~~not or~~ as part of a group governing body, board, or commission.

1. The applicant may satisfy the reporting requirements of RCW 42.17.241(1)(g)(ii) by identifying for the appropriate reporting period:

(a) The names of the reportable business clients for whom the applicant ~~(or the applicant’s spouse)~~ has done legal work 1;

¹Ordinarily, the identity of a client does not fall within the purview of the information protected by the attorney-client privilege unless there is a “strong probability” that the disclosure would convey the substance of a confidential communication between client and attorney. Splash Design, Inc. v. Lee, 104 Wn.App. 38, 14 P.3d 879 (2001) (describing Rule of Professional Conduct 1.6 and citing to Dietz v. Doe, 131 Wn.2d 835, 935 P.2d 611 (1997)); Tegland, Washington Practice, Vol. 5A, § 501.15 (1999); United States v. Hunton & Williams, 952 F.Supp. 843 (D.C. 1997)(under federal law, absent special circumstances, identity of a client of a lawyer or law firm is not protected by attorney-client privilege); C.K. Liew v. Breen, 640 F.2d 1046 (9th Cir. 1981) (citing to California law for same proposition, and to J. Wigmore, Evidence § 2313).

(b) Other reportable business clients of the law firm whose interests are significantly affected by the applicant's actions in the applicant's official capacity as **(name of office or position held)** whose identities become known to the applicant by any means; **(If applicable, list name of governing body, board or commission)**

(c) The names of the reportable business clients of the law firm when:
(i) the names are listed in Martindale Hubbell, the firm's publicity brochure(s), or the firm's resume, website, or similar promotional materials of the firm; or,
(ii) the whose identities are otherwise publicized or referenced in documents open for public inspection at the courts, in administrative hearings, or at other public agencies; or
(iii) the identities have been disclosed in documents made available for public inspection at open public meetings of public agencies; or,
(iv) the identities have been made a matter of public knowledge in other similar public forums, and

(d) All governmental clients that have done business with the law firm. 2

2. Where the identity of the clients of a lawyer or law firm is not otherwise a matter of public record or public knowledge and thus automatically disclosable under 1(c) or 1(d), the responsibility is placed upon the attorney to obtain the consent of the reportable business or corporate clients to enable the reporting of those client identities.

2. The applicant shall recuse him or her self from participating in decisions in his or her elected or appointed capacity affecting the interests of the law practice of the applicant or the applicant's spouse for which the reporting modification is requested.

2The names of governmental clients are matters of public knowledge in listings in Martindale Hubbell; the firm's publicity brochure(s), websites, or other promotional materials; or the firm's resume. The names of government clients are also matters of public knowledge in records that disclose that the firm is representing the client, including but not limited to documents reflecting payments of public funds from the governmental agency to the law firm; court filings; filings in administrative hearings; and in public records. See definition of public record at RCW 42.17.020(36) and (42).

Lawyers and Law Firms Protocol
(When Applicant is a Candidate (Not an Incumbent office Holder) and Acts Alone or as Part of a Governing Body, Board or Commission)

The “~~Kimura Protocol~~” following language is to be used when the applicant must report the activities of a law firm because of the relationship to the firm by either the applicant or the applicant’s spouse.

The following ~~format~~ language is to be used when the applicant is a **candidate** (does not hold office) and if elected, **will act alone**, ~~not will either act alone or~~ as part of a governing body, board or commission.

1. The applicant may satisfy the reporting requirements of RCW 42.17.241(1)(g)(ii) by identifying for the appropriate reporting period:

(a) The names of the reportable business clients for whom the applicant ~~(or the applicant’s spouse)~~ has done legal work 3;

(b) Other reportable business clients of the law firm whose interests are significantly affected by the actions of the office of **(the office being sought)** whose identities become known to the applicant by any means; **(If applicable, list name of governing body, board or commission)**

(c) The names of the reportable business clients of the law firm when:
(i) the names are listed in Martindale Hubbell, the firm’s publicity brochure(s), or the firm’s resume, website, or similar promotional materials of the firm; or,

(ii) the whose identities are otherwise publicized or referenced in documents open for public inspection at the courts, in administrative hearings, or at other public agencies; or

(iii) the identities have been disclosed in documents made available for public inspection at open public meetings of public agencies; or,

3Ordinarily, the identity of a client does not fall within the purview of the information protected by the attorney-client privilege unless there is a “strong probability” that the disclosure would convey the substance of a confidential communication between client and attorney. Splash Design, Inc. v. Lee, 104 Wn.App. 38, 14 P.3d 879 (2001) (describing Rule of Professional Conduct 1.6 and citing to Dietz v. Doe, 131 Wn.2d 835, 935 P.2d 611 (1997)); Tegland, Washington Practice, Vol. 5A, § 501.15 (1999); United States v. Hunton & Williams, 952 F.Supp. 843 (D.C. 1997)(under federal law, absent special circumstances, identity of a client of a lawyer or law firm is not protected by attorney-client privilege); C.K. Liew v. Breen, 640 F.2d 1046 (9th Cir. 1981) (citing to California law for same proposition, and to J. Wigmore, Evidence § 2313).

(iv) the identities have been made a matter of public knowledge in other similar public forums, and

(d) All governmental clients that have done business with the law firm. 4

2. Where the identity of the clients of a lawyer or law firm is not otherwise a matter of public record or public knowledge and thus automatically disclosable under 1(c) or 1(d), the responsibility is placed upon the attorney to obtain the consent of the reportable business or corporate clients to enable the reporting of those client identities.

~~2. The applicant shall recuse him or her self from participating in decisions in his or her elected or appointed capacity affecting the interests of the law practice of the applicant or the applicant's spouse for which the reporting modification is requested.~~

4The names of governmental clients are matters of public knowledge in listings in Martindale Hubbell; the firm's publicity brochure(s), websites, or other promotional materials; or the firm's resume. The names of government clients are also matters of public knowledge in records that disclose that the firm is representing the client, including but not limited to documents reflecting payments of public funds from the governmental agency to the law firm; court filings; filings in administrative hearings; and in public records. See definition of public record at RCW 42.17.020(36) and (42).

PDC Interpretation

DRAFT

APPROVAL
DATE:

NUMBER: 02-04

STATUS: Pending

SUPERSEDES: Prior Protocols

REFERENCES: RCW 42.17.240
RCW 42.17.241
RCW 42.17.370(10)
WAC 390-24
WAC 390-28
“F-1” Form (Personal Financial
Affairs Statement)
PDC Declaratory Order No. 7
PDC Interpretation 91-01
“Personal Financial Affairs
Statement – Instruction Manual
and Blank Forms”

APPROVED BY: The Commission

Requests for Modification of the Requirements to Report Information on the Personal Financial Affairs Statement (F-1) For Judges and Judicial Candidates

Background

The Public Disclosure Commission enforces the election and campaign reporting requirements in chapter 42.17 RCW. The statutes require certain candidates and public officials to report their financial affairs on a “Personal Financial Affairs Statement” (an “F-1” form). RCW 42.17.240, RCW 42.17.241. The Commission is authorized to allow modifications or suspensions of these reporting requirements under RCW 42.17.370(10) when it finds that “literal application” of the chapter “works a manifestly unreasonable hardship” and that the suspension or modification of the reporting requirements “will not frustrate the purposes of the chapter.” The Commission shall suspend or modify the reporting requirement or requirements only to the extent necessary to substantially relieve such hardship, and only upon clear and convincing proof of such claim.

The PDC has adopted rules to further identify reporting modification/suspension procedures. Those rules are in WAC 390-28. The procedures include making the request in writing, and requesting a hearing. The requester is not required to attend the hearing in person and may instead submit a written, sworn statement. The possible qualifications for obtaining a reporting modification with respect to an F-1 Form are identified in WAC 390-28-100.

In addition, due to the volume and similarity of modification or suspension requests concerning F-1 Forms from certain professions, the Commission has also developed a series of "protocols" that interpret the statute and rules with respect to those professions. The protocols enable easier consideration of such requests. Those protocols are now being provided in this single interpretation.

PDC Interpretation

Judges and Judicial Candidates Protocol

The following language is to be added to a modification that is granted to an applicant who is a judge or a judicial candidate.

1. This modification is granted on the basis that the applicant is subject to the Canons of Judicial Conduct, specifically the disqualification provisions of Canon 3(D); ~~and that the applicant will disqualify himself as recommended by Canon 3(D).~~

PDC Interpretation

DRAFT

APPROVAL
DATE:

NUMBER: 02-05

STATUS: Pending

SUPERSEDES: Prior Protocols

REFERENCES: RCW 42.17.240
RCW 42.17.241
RCW 42.17.370(10)
WAC 390-24
WAC 390-28
“F-1” Form (Personal Financial
Affairs Statement)
PDC Declaratory Order No. 7
PDC Interpretation 91-01
“Personal Financial Affairs
Statement – Instruction Manual
and Blank Forms”

APPROVED BY: The Commission

Requests for Modification of the Requirements to Report Information on the Personal Financial Affairs Statement (F-1) For Motor Vehicle Dealers

Background

The Public Disclosure Commission enforces the election and campaign reporting requirements in chapter 42.17 RCW. The statutes require certain candidates and public officials to report their financial affairs on a “Personal Financial Affairs Statement” (an “F-1” form). RCW 42.17.240, RCW 42.17.241. The Commission is authorized to allow modifications or suspensions of these reporting requirements under RCW 42.17.370(10) when it finds that “literal application” of the chapter “works a manifestly unreasonable hardship” and that the suspension or modification of the reporting requirements “will not frustrate the purposes of the chapter.” The Commission shall suspend or modify the reporting requirement or requirements only to the extent necessary to substantially relieve such hardship, and only upon clear and convincing proof of such claim.

The PDC has adopted rules to further identify reporting modification/suspension procedures. Those rules are in WAC 390-28. The procedures include making the request in writing, and requesting a hearing. The requester is not required to attend the hearing in person and may instead submit a written, sworn statement. The possible qualifications for obtaining a reporting modification with respect to an F-1 Form are identified in WAC 390-28-100.

In addition, due to the volume and similarity of modification or suspension requests concerning F-1 Forms from certain professions, the Commission has also developed a series of “protocols” that interpret the statute and rules with respect to those professions. The protocols enable easier consideration of such requests. Those protocols are now being provided in this single interpretation.

PDC Interpretation

Motor Vehicle Dealers Protocol

The following language is to be included when the applicant is required to report the activities of a vehicle dealership because ~~either the applicant or the applicant's spouse~~ held an office, directorship, general partnership or ownership interest in the dealership.

The following ~~format language~~ is to be used whether the applicant is a candidate or incumbent, and whether he or she acts alone or as part of a governing body, board or commission.

1. The applicant may satisfy the reporting requirements of RCW 42.17.241(1)(g) by identifying for the appropriate reporting period:
 - (a) All purchases and leases of vehicle, and purchases of parts and services by **(the entity, agency, board or commission on which the applicant is seeking to serve or serves)** from **(name of dealership)**;
 - (b) Business customers and governmental entities other than **(the entity, agency, board or commission on which the applicant is seeking to serve or serves)** that purchased or leased ten (10) or more vehicles from **(the entity, agency, board or commission on which the applicant is seeking to serve or serves)**;
 - (c) Business customers who paid in excess of \$15,000 for the purchase of parts and/or service from **(name of dealership)**; and

- (d) All governmental entities other than **(the entity, agency, board or commission on which the applicant is seeking to serve or serves)** that paid in excess of \$7,500 for the purchase of parts and/or service from **(name of dealership)**.
1. ~~The applicant, if elected, shall recuse him or her self from participating in decisions in his or her elected or appointed capacity affecting the interests of the business of the applicant or the applicant's spouse for which the reporting modification was requested.~~